Supreme Court, U. S.
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No. 97-814

In The SUPREME COURT OF THE UNITED STATES

October Term, 1997

CITY OF CLEVELAND,

Petitioner,

v.

NATION OF ISLAM, *et al.*,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REPHRASED QUESTION PRESENTED

Whether by seeking a declaratory judgment in a state court during negotiations over the threat of a federal civil rights lawsuit a municipality may avoid an award of attorneys' fees to a nominal defendant who prevailed after removal on a counterclaim and to plaintiffs who received injunctive relief in a consolidated federal case?

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STATEMENT OF THE CASE

Under Rule 15.2 of the Rules of the Supreme Court of the United States, Respondents are obliged "to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Unfortunately, two significant misstatements were made in the Petition, one involving the sequence of events and the other the identity of parties.

The sequence of events leading to Petitioner's declaratory judgment action justified the appellate court's concern with "parties rushing to the courthouse, eager to achieve plaintiff status" by "quickly filing declaratory judgment actions when faced with possible constitutional challenges." *City of Cleveland v. Nation of Islam*, No. 96-3291 (6th Cir. 1997)(Appendix to Petition at App. 5). Contrary to Petitioner's version that it commenced litigation "after fruitless negotiations," Petition at 5, a race to the courthouse was run without Respondents' knowledge when; ***during*** negotiations over a documented and researched threat to vindicate in federal court the First Amendment right of access to a public forum, Petitioner requested more time to respond and instead sought home field advantage by commencing a lawsuit in state court.

The party to Petitioner's declaratory judgment action was the Nation of Islam. After that action was removed to federal court, a separate federal action was brought by two other parties: Muhammad's Mosque No. 18 and Minister Roland Muhammad. *See City of Cleveland*, *supra*, at App.

2-3. Petitioner combines these parties as if they were the same party. Petition at 6 ("The Nation filed an answer and counterclaim on February 3, 1995. (App. 34-50). Thereafter, on February 7, 1995, the Nation commenced a separate action for preliminary and permanent injunctive relief[.]"). The two actions were consolidated, with declaratory relief being granted to the nominal defendant on the counterclaim in the removed case and injunctive relief awarded to the prevailing plaintiffs in the original action.

REASONS FOR DENYING THE PETITION

On the two questions presented by Petitioner, the federal appellate courts are in harmony: (1) the label or technical status of a prevailing party yields to the function that party has served in vindicating civil rights and exposing a violator of those rights; and (2) the good faith of the losing party is not a special circumstance justifying denial of a fee award to such a prevailing party. Adhering to the express language of 42 U.S.C. § 1988, with its plain meaning corroborated by legislative history and statutory purpose, the courts have refused to stage a race to the courthouse where the winner of the race, a nominal plaintiff, is rewarded with immunity from a fee award. Recognizing that good faith is the expected motivation of every competent government official and the presumed litigating posture of every losing party, particularly when the absence of good faith may be sanctioned under Fed. R. Civ. P. 11, the courts have not converted this ordinary circumstance into a special one exempting the losing party from 42 U.S.C. § 1988.

Petitioner has failed to demonstrate why this Court should grant review when presented with neither a conflict nor a deviation from statutory language and congressional intent and purpose. Indeed, review of the first question presented does not even dispose of the statutory right to a fee award exercised by the actual plaintiffs, Muhammad's Mosque No. 18 and Minister Roland Muhammad. Moreover, reversal of settled law is especially ill advised because a practical, functioning regime for handling fee awards would be replaced with an impractical, dysfunctional invitation to litigate those awards.

I. NO CONFLICT EXISTS IN THE FEDERAL COURTS OVER THE QUESTIONS PRESENTED IN THE PETITION.

A fee award under 42 U.S.C. § 1988 is made to a party for vindicating federal civil rights and exposing a civil rights violator. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978)("the plaintiff is the chosen instrument of Congress to vindicate [civil rights]" and fees are awarded "against a violator of federal law"). Any party performing these functions is entitled to a fee award.

No federal appellate court has denied fees to a nominal defendant based on the label or technical status of that party. In *Kirchberg v. Feenstra*, 708 F.2d 991, 996 (5th Cir. 1983), the appellate court emphasized the function served by the nominal defendant: "[I]t was she who brought the constitutional claim decided by the district court." Focus on how the party functioned, rather than the category in which the party was listed, has also been the standard in this Court. In *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 762 (1989), intervenors were

protected by the *Christiansburg Garment Co.* standard because "in contrast to losing Title VII defendants who are presumptively liable for attorney's fees, losing intervenors . . . have not been found to have violated anyone's civil rights."

Absent a conflict among the federal appellate courts or a discrepancy with this Court's approach to fee awards, review is inappropriate. Indeed, review would only be proper were the lower courts to decide fee awards based on labels or technical status, the indefensible position taken by Petitioner's first question presented.

That good faith does not constitute a "special circumstance" under 42 U.S.C. § 1988 is "the rule in this and apparently every other circuit that has considered the issue." *Williams v. Hanover Housing Authority*, 113 F.3d 1294, 1301 (1st Cir. 1997). *See also Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 273 (6th Cir. 1991)("However, good faith is not a 'special circumstance' which justifies the denial of attorney's fees under § 1988."); *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985)(*en banc*)("Defendant's good faith, lack of culpability, or prompt remedial action do not warrant a denial of fees under the special circumstances preclusion."); *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1250 (9th Cir. 1981)("Good faith by itself is not a special circumstance justifying a denial of attorney's fees."); *Love v. Mayor, City of Cheyenne*, 620 F.2d 235, 236 (10th Cir. 1980)("[T]he good faith of the defendant is not a reason for the denial of § 1988 attorney's fees.").

In *Williams v. Hanover Housing Authority*, *supra*, 113 F.3d at 1301-02, the appellate court appreciated that reliance on mistake of law is a good faith defense: "The

circuits are in agreement, however, that defendants' good faith reliance even on settled law (which was scarcely the case here) is not a 'special circumstance' warranting a denial of attorneys' fees under § 1988[.]" This understanding is so widespread in the lower federal courts that Petitioner's approach would inject confusion and encourage impractical litigation over good faith.

Petitioner's argument on special circumstances is analytically indistinguishable from a good faith exception to a fee award. Claiming that it had to choose between honoring equal access to public accommodations and permitting a speaker rental of a public forum for an address to a single-sex audience in the tradition of the speaker's religion, Petitioner is effectively invoking good faith for its declaratory judgment gambit.

By not appealing the adverse merits decision in the District Court, Petitioner has acknowledged that it made a mistake, denying the speaker's First Amendment rights due to a misapplication of public accommodations principles. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995), this Court unanimously held that a comparable "use of the state's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."

Petitioner is in no different position than any other losing party who has in good faith taken steps or made decisions later determined to be unlawful. Consequently, the Petition actually presents the question of whether fee-shifting provisions should be emasculated, a question that this Court has absolutely no reason to entertain.

Finally, the dire prediction by Petitioner that the "special circumstances" exception will evaporate unless this Court grants a writ of certiorari is belied by established precedent. Lower federal courts have adopted the view that nominal relief may be a special circumstance. *See, e.g., Pino v. Locascio*, 101 F.3d 235, 238 (2d Cir. 1996), applying *Farrar v. Hobby*, 506 U.S. 103, 117 (1992)(O'Connor, J., concurring)("§ 1988 contemplates the denial of fees to *de minimis* victors."). Outrageous or inexcusable conduct by the prevailing party has likewise been recognized as a special circumstance. *See, e.g., Fair Housing Council v. Landow*, 999 F.2d 92, 97-98 (4th Cir. 1993); *Lewis v. Kendrick*, 944 F.2d 949, 956 (1st Cir. 1991). Untimely application for fees is another settled special circumstance. *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 454 (1982)("We believe that this discretion will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party."). The special circumstance of a prevailing defendant has also been considered. *Christiansburg Garment Co., supra*. Review by this Court is hardly necessary to preserve the "special circumstances" exception to fee awards.

II. THE ANSWERS IN THE SIXTH CIRCUIT TO THE QUESTIONS PRESENTED IN THE PETITION ARE PERFECTLY CONSISTENT WITH THIS COURT'S UNDERSTANDING OF 42 U.S.C. § 1988.

As interpreted by this Court, the language of 42 U.S.C. § 1988, its legislative history, and its purpose support a fee award to a nominal defendant and prevailing plaintiffs who have vindicated federal civil rights by overcoming a good faith denial of First Amendment access

to a public forum. Consequently, the decision below fully comports with precedent and resolves the questions presented in the Petition in a way that should be left undisturbed by review.

Fee-shifting in a federal civil rights action is governed by 42 U.S.C. § 1988, which provides in pertinent part that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The juxtaposition of "discretion" and "may" led this Court to recognize a narrow "special circumstances" exception:

> The section states that the court "in its discretion" may allow a fee, but that discretion is not without limits: the prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

Blanchard v. Bergeron, 489 U.S. 87, 89 n. 1 (1989), quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

In *Christiansburg Garment Co.*, this Court noted that the language of 42 U.S.C. § 1988 was neutral as to party status. Citing statutes that limited fee-shifting to prevailing plaintiffs, the Court described the language as "more flexible, authorizing the award of attorney's fees to either plaintiffs or defendants." 434 U.S. at 415-16. Losing plaintiffs were accorded added protection in *Christiansburg Garment Co.* due to the special circumstance that prevailing defendants had neither vindicated civil rights nor exposed "a violator of federal law." 434 U.S. at 418.

In the statute's phrasing Congress has not precluded fee awards to nominal defendants or imposed a good faith exception. As to nominal defendants, the legislative history and statutory purpose confirm the import of the language. "In enacting § 1988, Congress specifically provided that the *Newman* rule would apply to prevailing plaintiffs who were nominal defendants." *Kirchberg*, *supra*, 708 F.2d at 996.

The legislative history is explicit. Citing *Shelley v. Kraemer*, 334 U.S. 1 (1948), a Senate Committee explained that "in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5912 n. 4. As indicated above, Congress focused on the civil rights enforcement function performed by the party, rather than the party's label or technical status.

As to good faith, 42 U.S.C. § 1988 establishes only that a party must have prevailed. *See*, *e.g.*, *Love v. Mayor, City of Cheyenne*, *supra*, 620 F.2d at 236 ("§ 1988 contains no suggestion that there is a need to establish bad faith as a basis for the award of attorney's fees."). Under *Christiansburg Garment Co.*, the two prerequisites are vindication of federal civil rights by demonstration that the opponent has violated those rights of the prevailing party. In *Newman*, *supra*, 390 U.S. at 401, this Court traced the legislative history of 42 U.S.C. § 1988 and rejected any requirement of a "subjective standard" of bad faith. "[N]o new statutory provision would have been necessary" if Congress merely intended to duplicate preexisting judicial power to shift fees when a party did not act in good faith. *Id.* at 402 n. 4. Nothing in the legislative history or statutory purpose supports engrafting a good faith exemption, which would then be litigated on every

application for a fee award, and this Court ought not grant review for such a quixotic venture.

Citing the Equal Access to Justice Act (EAJA), Petitioner urges this Court to adopt a comparable approach for 42 U.S.C. § 1988. The EAJA expressly prohibits a fee award when the government's position was "substantially justified or . . . special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(a). Obviously, this language differs markedly from both the phrasing of 42 U.S.C. § 1988 and the precedent on special circumstances. *See Pierce v. Underwood*, 487 U.S. 552, 565 (1988)("justified to a degree that could satisfy a reasonable person"). Thus, Petitioner is really seeking a legislative amendment, a flatly unpersuasive basis for a party to invoke this Court's jurisdiction.

In light of the language, legislative history, and statutory purpose, the mode of interpretation in another 42 U.S.C. § 1988 case dictates rejection of this Petition. In *Blum v. Stenson*, 465 U.S. 886, 896 (1994), this Court described that mode: "Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." Responding to the type of policy argument raised by Petitioner, this Court reaffirmed the limited scope of judicial review: "Resolution of these two arguments begins and ends with an interpretation of the attorney's fee statute." *Id.* at 893. Similarly, resolution of Petitioner's effort to secure a writ of certiorari should begin and end with the language of 42 U.S.C. § 1988 permitting an award to nominal defendants and omitting a good faith immunity to an award.

III. ON THE FACTS OF THIS CASE, THE FIRST QUESTION PRESENTED IN THE PETITION IS NOT DISPOSITIVE OF TWO RESPONDENTS' STATUTORY RIGHT TO A FEE AWARD.

Distinguishing the parties' identities is important to the first question presented in the Petition. The issue raised there was that nominal defendants should be treated like actual defendants. The parties' distinct identities demonstrate that the first question presented is not dispositive in this case.

Both Muhammad's Mosque No. 18 and Minister Roland Muhammad were actual plaintiffs seeking preliminary and permanent injunctive relief, and they secured that relief in the consolidated case. The Nation of Islam was a nominal defendant and secured relief on a counterclaim to the declaratory judgment action brought by Petitioner.

Regardless of how *Christiansburg Garment Co.* applies to nominal defendants, two prevailing plaintiffs are entitled to a fee award here. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)("if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit"). Reviewing a question that does not control the underlying issue of a fee award is a futile exercise of this Court's jurisdiction.

CONCLUSION

In *Hensley*, *supra*, 461 U.S. at 437, this Court admonished lower federal courts and parties that "[a]

request for attorney's fees should not result in a second major litigation." That message should not be diluted by granting a writ of certiorari in this case.

Determining when a prevailing party deserves a fee award and which special circumstances warrant denial of any award has not divided the lower federal courts or been problematic in federal civil rights actions. The controlling standards track the language of 42 U.S.C. § 1988 and fulfill the function envisioned by Congress for fee awards. For these and the foregoing reasons, the Petition should be denied.

Dated: December 12, 1997

Respectfully submitted,

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